WASHINGTON WATER UTILITY COUNCIL
OF THE PACIFIC NORTHWEST SECTION OF AWWA

March 31, 2006

Doug Rushton
PO Box 47600
Olympia WA 98504

Re: Comments on Paper on Section 5(2) of the Municipal Water Law

Dear Doug:

We are writing in response to your request for comments on a joint Department of Health and Ecology interpretive paper on Section 5(2) of 2E2SHB1338, the Municipal Water Law (MWL). While this is just focused on one portion of the MWL, we plan to make further comments on state interpretations on other sections of the MWL.

WWUC appreciates the Department of Health (DOH) and Department of Ecology (DOE) effort to clarify their interpretation of Section 5(2) of the Municipal Water Law dealing with Service Area, Compliance, and Consistency. While we are in general agreement with a number of points, there are several points we take issue with and submit what we believe to be the correct interpretation.

The three major points of contention are:

1) **The proposal to determine "in compliance" and "not inconsistent" on a continuous basis.** This would be inconsistent with the purpose of Section 5(2) of 2E2SHB 1338, and would also be unnecessarily burdensome and complicated for both purveyors and DOH/DOE. The statute contemplates that the determination that a supplier is "in compliance with" a water system plan will be made by the DOH at the time of approving a planning or engineering document under chapter 43.20 RCW (or a county's approval of service area boundaries in a coordinated water system plan). This is a fixed point in time, usually once every six years, not a continuous review. The determination that the alteration of the place of use is "not inconsistent" with applicable plans and development regulations is presumably made concurrently because the statute adds that language as a condition to the "in compliance" determination. There is no language in the statute suggesting that these determinations be made outside the context of approval of a planning or engineering document under chapter 43.20 RCW (or a county's approval of service area boundaries in a coordinated water system plan).

   Supporting this interpretation is the fact that chapters 43.20 and 70.116 do not provide for reviews of compliance "at all times" but only at certain milestones, such as plan update approvals and engineering document reviews for system expansions. Also, many possible bases for non-compliance or inconsistency could arise beyond the control of the supplier, such as a change in customer usage habits or local land use regulatory changes. If the legislature intended to create an "at all times" review of

plan consistency, which radically alters the current system of review of water system plans and engineering documents, it would have been more specific about it. The DOH/DOE interpretation would make the place of use variable due to factors which may change on a daily basis or be beyond the control of the supplier. The courts discourage statutory interpretations that create absurd results like that.

2) **The proposal to solicit comments from the Watershed planning participants during the DOE review of "not inconsistent" with watershed plans.** This is inappropriate because the watershed plan should stand on its own and not subject to various "after the fact" viewpoints about issues that may not be in the plan.

3) **The proposal that only a Water System Plan (WSP) approved after September 9, 2003 can be used to modify "Place of Use."** This was not stated in the Municipal Water Law which made the service area in a DOH-approved WSP the "Place of Use" for the municipality's water right(s) by operation of law on 9/9/03 subject to certain compliance conditions.

Our specific comments and suggestions are as follows:

Page 1, Line 13: **The second time "service area" is used in this line it should be replaced with the word "supplier" as stated in the Municipal Water Law.**

Page 1, Line 14: **After the word "and" add "the alteration of the place of use is."**

Page 1, Line 15: **Delete "on a continuous basis."** The alteration of place of use is checked for consistency at the time of water system plan review. At some later date, if a comprehensive plan or watershed plan is changed, the municipal supplier cannot be required to make a service-area change until the next scheduled water system plan review. (See your answer to Question 4.)

Page 2, Line 56: **At the end of the sentence add "or a prior DOH-approved planning or engineering document."** In the future, a supplier may be expanding the place of use from a previously DOH-approved service area/place of use that is larger than that in the water right documents.

Page 2, Line 67: **After the words "watershed plans", add "approved according to RCW 90.82 or 90.54."** This would clarify which type of watershed plans and make it consistent with the Municipal Water Law.

Page 2, Line 76-78 **Delete the first sentence of this paragraph and the phrase, "and any comments received by interested parties".**
As stated above, it is inappropriate for DOE to be soliciting comments from interested parties on a watershed plan. The published approved watershed plan should be reviewed to determine if there is any specific item with which a WSP is inconsistent.

Page 2, Line 79: **Add "Ecology must specifically identify any finding of inconsistency".**

Page 2, Line 84: **Change "a" to "an" and delete "not."**
The context applies to an issuance of an "inconsistent" determination.

Page 2, Line 91-92 **Delete these lines based on points made in item 1) above.**

Page 2, Line 98: **At the end of the sentence, add the words "recognizing the significance of the violation. Furthermore, DOH shall use a procedure as outlined in Attachment #1."**
There needs to be some recognition of the severity of the violation so that the enforcement action is commensurate with the violation. WWUC has developed a reasonable "due process" procedure for DOH to use if there is a possible finding of "noncompliance."

Page 3, Line 101-102 **Delete the phrase "If the previous plan was approved after September 9, 2003".**

Page 3, Line 103: **Add "or the prior DOH-approved planning or engineering document, whichever is more recent."** This recognizes the standing of a DOH-approved WSP plan in place as of the effective date of Municipal Water Law and avoids the chaos created by reverting back to the original water right.

Page 3, Line 117: **Change "2009" to "2015".** It will be 12 years (i.e. two six-year cycles) for utilities to get two plans approved after September 9, 2003.

Thank you for the opportunity to comment on your draft paper.

Sincerely,

James W. Miller
Chair, WWUC Water Rights Committee

Attachment (1)

Attachment #1
3/31/06

MUNICIPAL WATER LAW – SECTION 5(2)
WWUC PROPOSED "DUE PROCESS" PROCEDURE TO POSSIBLE FINDING OF "NONCOMPLIANCE"

This proposal concerns the topic of "compliance" with water system plan or small water system management program under section 5(2) of the MWL, RCW 90.03.386(2). The WWUC agrees that DOH should determine plan "compliance" at the time of WSP or SWSMP approval. The WWUC agrees that DOH should consider the approval date, efficiency requirements, reclaimed water evaluation, service area, and self assessment elements.

The WWUC proposes the following process if extraordinary circumstances arise that concern public health and safety. DOH will provide a fair opportunity for the municipal water supplier to be heard, using the following process.

- DOH will inform the municipal water supplier of the issues or concerns.
- If DOH has received any complaints or concerns from third parties, then DOH will provide such information to the municipal water supplier.
- DOH will provide the municipal water supplier a reasonable opportunity, at least 30 days, to respond.
- If DOH determines that the municipal water supplier is not in "compliance," then DOH will make such determination by issuance of an order.
- The order will specify the actions or omissions that give rise to the "noncompliance" and will identify the specific steps the municipal water supplier must take to cure noncompliance and to come into compliance.
- After the municipal water supplier has responded to the order and made a showing of compliance, DOH shall act on the compliance showing within 30 days by rescinding the order and declaring the utility to be in "compliance" or by specifying the reasons for continued noncompliance.

If DOH issues an order of "noncompliance", DOH may notify the municipal water supplier that it cannot, during the time the DOH order is in effect, issue letters of availability for additional connections in the relevant portion of the "expanded" place of use, *i.e.*, the area that is beyond the service area in a previously-approved water system plan.

Expanded place of use authority is restored automatically when DOH declares the noncompliance to be cured. No further action by Ecology is necessary for "expanded" place of use authority to be restored following DOH rescission of the order or declaration of compliance. DOH will copy Ecology on actions to issue, rescind or amend an order.

Nothing in the above process would restrict DOH authority to take immediate regulatory action or to issue an emergency order if necessary to protect the public health and safety.